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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/822,138	04/12/2004	Kenneth F. Binmoeller	026923-000200US	1173
20350 7590 10/28/2008 TOWNSEND AND TOWNSEND AND CREW, LLP TWO EMBARCADERO CENTER EIGHTH FLOOR SAN FRANCISCO, CA 94111-3834				
EXAMINER				
MASHACK, MARK F				
ART UNIT		PAPER NUMBER		
3773				
MAIL DATE		DELIVERY MODE		
10/28/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/822,138

Applicant(s)

BINMOELLER ET AL.

Examiner

MARK MASHACK

Art Unit

3773

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 September 2008.
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-49 is/are pending in the application.
4a) Of the above claim(s) 1-25 and 30-47 is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 26-29, 48 and 49 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB-08)
Paper No(s)/Mail Date 12/17/2007.
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____

DETAILED ACTION

Election/Restrictions

1. **Claims 1-25, 30-47** are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to nonelected claims, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 9/19/2008.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. **Claims 26-29** are rejected under 35 U.S.C. 103(a) as being unpatentable over **Allen et al.** ("**Allen**" **US 6,113,611**) in views of **Ho et al.** ("**Ho**" **US 2003/0093118**).

Allen discloses a central member (central segment of fastener **10**) which permits the passage of a penetrating member **54** through the sleeve and through two layers of tissue (Column 1, Lines 8-13) and also can be used in attaching a tubular graft to an artery (Column 3, Lines 45-57)

The central member comprises two legs on each end which transition from a straight leg configuration and curl radially to produce an increase in a distal radius to provide an anchor and is capable of reducing trauma to neighboring structures (FIG 5).

Allen discloses positioning the apparatus next to A tubular tissue and advancing the first leg in order to restrain motion of the apparatus (FIG 5).

Allen discloses the apparatus being used to attach a graft to a vascular tissue. **Allen** does not explicitly teach the graft being natural tissue. However, **Ho** teaches that homologous or autologous grafts are commonly known in the art (Paragraph 4). It would have been obvious to one of ordinary skill in the art at the time of the invention to use an autologous graft instead of a synthetic graft in order to enhance the healing response.

5. **Claims 48-49** are rejected under 35 U.S.C. 103 (a) as being unpatentable over **Allen** in views of **Beyar et al.** ("**Beyar**" **US 5,520,700**).

Allen discloses a central member (central segment of fastener **10**) which permits the passage of a penetrating member **54** through the sleeve and through two layers of tissue (Column 1, Lines 8-13) and also can be used in attaching a tubular graft to an artery (Column 3, Lines 45-57). **Allen** discloses positioning the apparatus next to the tubular tissue and advancing the first leg in order to restrain motion of the apparatus (FIG 5). **Allen** does not explicitly disclose the needle to be pre-biased.

Beyar teaches of using compressed air to bias a penetrating member into tissue (FIG 8 and Column 2, Lines 63, - Column 3, Line 13). All of the claimed elements were known in the prior art and one skilled in the art could have combined the elements as

claimed by known methods with no change in their respective functions, and the combination would have yielded predictable results to one of ordinary skill in the art at the time of the invention. Given the teachings of **Beyar**, it would have been obvious to one of ordinary skill in the art to pre-bias the penetrating member so that releasing it would produce penetration. Doing so would facilitate the delivery of the anchoring device.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MARK MASHACK whose telephone number is (571)270-3861. The examiner can normally be reached on Monday-Thursday 9:00am-5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jackie Ho can be reached on (571) 272-4696. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Mark Mashack/
Examiner, Art Unit 3773

/Darwin P. Erez/
Primary Examiner, Art Unit 3773